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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. THOMAS ARTHUR BROOKS, Defendant and Appellant.	E046488, E047045 (Super.Ct.Nos. RIF142638 & RIF129331) O P I N I O N

APPEAL from the Superior Court of Riverside County. Byron K. McMillan,* Helios (Joe) Hernandez, and Edward D. Webster, Judges. Affirmed in part and reversed in part with directions.

James R. Bostwick, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

* Retired judge of the Orange Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and Barry Carlton and Teresa Torreblanca, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant Thomas Arthur Brooks appeals from judgments entered in superior court case Nos. RIF142638 and RIF129331, and his appeals have been consolidated.[1] He raises three claims of error, and the People agree that all three claims have merit. We, too, find merit in each claim.

Defendant first claims his grand theft conviction in RIF142638 must be reduced to attempted grand theft because the evidence presented at trial showed he never obtained possession of the funds he attempted to steal. Because the People concede this claim and we agree it has merit, we reduce defendant's grand theft conviction in RIF142638 to attempted grand theft.

Next, defendant claims he was deprived of his Sixth Amendment right to counsel at the plea bargaining and sentencing stages of RIF129331 and the resentencing stage of RIF142638. On October 8, 2008, after defendant was sentenced in RIF142638 with the assistance of counsel, he made the latest of numerous *Marsden*[2] motions to replace his appointed counsel. The court granted the motion and relieved defendant's counsel, but

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[1] Defendant's appeal from the judgment in RIF129331 has been assigned appellate court case No. E047045, and his appeal from the judgment in RIF142638 has been assigned case No. E046488. Case No. E046488 has been designated the master file.

[2] *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

did not appoint substitute counsel and ordered defendant to represent himself in RIF129331 and two other pending cases, RIF132231 and RIM514795, over defendant's express objection and without obtaining his knowing and intelligent waiver of his right to counsel.

Thereafter, on October 14, defendant pled guilty to one count of burglary in RIF129331 in exchange for a sentence of eight years eight months in RIF129331 *and* RIF142638, time served in RIF132231 and dismissal of the charges in RIM514795. The court then accepted defendant's guilty plea in RIF129331, recalled his original sentence in RIF142638, resentenced him in RIF142638, and sentenced him in RIF129331 without his being represented by counsel.

Because we agree defendant was deprived of his right to counsel, we reverse his conviction and sentence in RIF129331 and remand the matter for further proceedings in that case. We also remand the matter for resentencing in RIF142638 because, in that case, defendant was resentenced without the assistance of counsel. Lastly, defendant claims his presentence custody credits in RIF142638 were undercounted by one day and he is entitled to one additional day of credit. On remand, the court is directed to recalculate defendant's presentence custody credits in RIF142638.

II. PROCEDURAL BACKGROUND

In August 2008, defendant was tried before a jury in RIF142638 and found guilty as charged of burglary (Pen. Code, § 459),[3] grand theft (§ 487), and impersonating a

[3] All further statutory references are to the Penal Code unless otherwise indicated.

public officer (§ 146a, subd. (b)). In a bifurcated trial, the court found that defendant was released on bail at the time he committed the offenses (§ 12022.1) and had four prison priors (§ 667.5, subd. (a)).

Defendant was originally sentenced in RIF142638 on October 8, 2008. Before the sentence was imposed, defendant told the court he did not want Attorney Kenyon to represent him and wanted the court to conduct a *Marsden* hearing. The court asked defendant whether he wanted to represent himself, and defendant said "no." The court then proceeded with sentencing, with Attorney Kenyon representing defendant. Defendant was sentenced to six years eight months in prison, consisting of two years for the burglary, eight months for impersonating an officer, and four years for the four prison priors. A two-year term on the grand theft conviction was imposed but stayed under section 654. The court also imposed but stayed execution of a consecutive two-year term on the out-on-bail enhancement (§ 12022.1) pending resolution of the charges in RIF129331, because the enhancement was based on those charges. Defendant was awarded 282 days of presentence custody credits, consisting of 188 actual days and 94 days pursuant to section 4019.

Later on October 8 and after the court imposed sentence in RIF142638, the court called three other cases which were still pending against defendant, namely, RIF129331, RIF132231, and RIM514795. Defendant had pleaded not guilty in all three cases, but none of them had proceeded to trial. When the court asked defendant what he wanted to do with the pending cases, Attorney Kenyon and the prosecutor both told the court that

defendant had been offered a plea bargain which involved dismissing RIM514795, lifting the execution stay on the two-year term for the out-on-bail enhancement in RIF142638, and imposing eight month consecutive terms on the other two cases, RIF129331 and RIF132231.

When the court asked defendant whether he was interested in the offer, defendant repeated his earlier request to replace Attorney Kenyon with "a competent attorney." At that point, the court reminded defendant he had been told many times before that he had been through "seven" attorneys and if he could not get along with Attorney Kenyon he was going to have to act as his own attorney. Defendant told the court he did not want to represent himself, and he was renewing his *Marsden* motion to replace Attorney Kenyon. The court summarily granted the *Marsden* motion without conducting a hearing, relieved Attorney Kenyon of his representation, and ordered defendant to proceed in pro. per. in RIF129331, RIF132231, and RIM514795.[4]

On October 14, defendant, acting in pro. per., withdrew his not guilty plea in RIF129331 and pled guilty to a single count of burglary in that case pursuant to a felony plea agreement. Defendant had been charged in RIF129331 with three counts of burglary and three counts of grand theft. Before the court accepted defendant's guilty plea, it told defendant that he had "been through so many lawyers" the court did not need to appoint

[4] Between 2006 and October 8, 2008, defendant made numerous *Marsden* motions to replace Attorney Kenyon and each of his previously-appointed counsel. On August 19, 2008, only six days after the jury returned its verdicts in RIF142638, the court denied defendant's latest *Marsden* motion to replace Attorney Kenyon following a full hearing on the motion.

another one to represent him. The plea agreement stipulated that defendant would be sentenced to eight months on his burglary conviction in RIF129331, consecutive to an eight year sentence in RIF142638. Thus, the plea agreement stipulated that defendant would be resentenced in RIF142638 and his total sentence in both cases would be eight years eight months.

On October 14, and in accordance with the plea agreement, the court vacated defendant's original sentence in RIF142638 and resentenced him to eight years in prison in that case. On October 14, defendant was awarded 289 days of presentence custody credit in RIF142638, consisting of 193 actual days plus 96 days pursuant to section 4019. As indicated, he was originally awarded 282 days of presentence custody credit at his original sentencing on October 8, consisting of 188 actual days plus 94 days pursuant to section 4019.

On October 29, defendant was sentenced to a consecutive eight-month term for his burglary conviction in RIF129331.[5] Before the sentence was imposed, defendant asked to withdraw his guilty plea in RIF129331. The court denied his request on the grounds it was frivolous and intended to "consume more time as a device to stay locally." In RIF129331, defendant received credit for 264 days served, consisting of 176 actual days served and 88 additional days pursuant to section 4019.

[5] On October 14, the court reduced the section 69 charge in RIF132231 from a felony to a misdemeanor, and defendant pled guilty to that count; however, he received no additional time and was sentenced to 180 days of time served for that conviction. On October 29, the court dismissed the misdemeanor charges in RIM514795.

These consolidated appeals followed.[6]

III. DISCUSSION

A. *Defendant's Grand Theft Conviction in RIF142638 Must Be Reduced to Attempted Grand Theft Because Defendant Never Obtained Possession of the Funds He Attempted to Steal*

Defendant claims his grand theft conviction in RIF142638 must be reduced to attempted grand theft, because the evidence presented at trial was sufficient to show he committed the latter crime but not the former. The People agree, and so do we.

Indeed, the evidence showed that defendant attempted to steal $5,325.59 from Riverside Metro Nissan in the form of two credit card refund transactions, but neither transaction was processed. Thus, defendant never obtained possession of the funds.

1. Relevant Evidence

On March 18, 2008, defendant went into the service and parts department of Riverside Metro Nissan in Riverside and ordered a part. He told the cashier he would be paying by credit card, but he was a "special agent" and he had to enter a "special code" into the credit card machine. When the cashier attempted to take defendant's credit card,

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[6] Defendant filed notices of appeal on October 28 and December 3, 2008. Both notices stated that defendant was challenging the validity of his plea in RIF129331 and his sentence in RIF142638 and RIF129331, and both notices were accompanied by a request for a certificate of probable cause. The trial court initially denied the request for a certificate of probable cause; however, one was issued following the court's issuance of a writ of mandate in E048126 ordering the trial court to issue the certificate.

he told her he had to enter the code himself. When the cashier asked for identification, defendant flashed what appeared to be a badge.

The cashier turned the credit card machine toward defendant so he could access it. A slip printed, and the cashier noticed it was incorrect because it reflected a $325.59 credit or refund rather than a charge for the purchase. The cashier told defendant he had pressed the wrong button and she needed to find out how to correct the error. The cashier left the cashier station in order to seek assistance, and was gone for approximately five minutes.

Meanwhile, the manager of the parts department was watching defendant through a surveillance camera monitor, and saw him slide a credit card through the machine and press some buttons. The police were called, and the manager and another man approached defendant as he was walking out of the building. Defendant got into his car and drove away.

It was later discovered there had been two credit card refund transactions on the parts department's credit card machine for which there had been no original sales. One was for $325.59 on one card number and the other was for $5,000 on another card number. The second card number had been issued to defendant but had been suspended several weeks earlier. Due to the suspended status of the second card number, the $5,000 refund transaction was never processed. The $325.59 refund was stopped. Thus, the dealership was never out any money on either transaction.

2. Analysis

In order to uphold a criminal conviction against a challenge that the evidence is insufficient to support it, the record must reveal substantial evidence in support of each element of the crime. (*People v. Dominguez* (2006) 39 Cal.4th 1141, 1153.) Section 484, subdivision (a) describes several means of committing the crime of theft, including, as pertinent, theft by larceny. (*People v. Davis* (1998) 19 Cal.4th 301, 304-305.) The crime is grand theft if the value of the property stolen exceeds $400. (§ 487, subd. (a).)

Defendant was prosecuted for committing grand theft by larceny. "The elements of theft by larceny are well settled: the offense is committed by every person who (1) takes possession (2) of personal property (3) owned or possessed by another, (4) by means of trespass and (5) with intent to steal the property, and (6) carries the property away. [Citations.]" (*People v. Davis*, *supra,* 19 Cal.4th at p. 305.)

"'"The completed crime of larceny—as distinguished from an attempt—requires *asportation* or carrying away, in addition to the taking. [Citations omitted.]" [Citation.] "The element of asportation is not satisfied unless it is shown that 'the goods were severed from the possession or custody of the owner, and in the possession of the thief, though it be but for a moment.'" [Citation.]' [Citation.]" (*People v. Shannon* (1998) 66 Cal.App.4th 649, 654.)

The evidence here showed that defendant attempted to commit, but did not complete, the crime of grand theft by larceny. Specifically, he attempted to steal $5,325.59 in credit card refunds from Riverside Metro Nissan, but he did not complete

the crime because the refunds were never processed or posted to either of the two credit cards he used, not even for a moment.

Because defendant never obtained possession or control of the refund money, he is guilty of attempted grand theft, not grand theft, and his grand theft conviction must be reduced to attempted grand theft. (See *People v. Traster* (2003) 111 Cal.App.4th 1377, 1390-1391 [grand theft conviction reduced to attempted grand theft because defendant did not obtain possession or control of money he attempted to steal through use of credit card]; §§ 1181, cl. (6), 1260.)

B. *Defendant Was Deprived of His Sixth Amendment Right to Counsel in the Plea Bargaining and Sentencing Stages of RIF129331 and the Resentencing Stage of RIF142638*

Defendant contends the trial court violated his Sixth Amendment right to counsel in ordering him to represent himself in pro. per. on October 8, 2008, over his objection and without obtaining his knowing and intelligent waiver of his right to counsel. The People agree, and so do we.

A criminal defendant has a Sixth Amendment right to be represented by counsel at all critical stages of the proceedings in which his or her substantial rights are at stake. (*People v. Crayton* (2002) 28 Cal.4th 346, 362, citing *Mempa v. Rhay* (1967) 389 U.S. 128, 134.) These include the plea bargaining and sentencing stages. (See *People v. Brown* (1986) 179 Cal.App.3d 207, 214 [right to counsel on motion to withdraw plea]; *Clemensen v. Municipal Court* (1971) 18 Cal.App.3d 492, 499 [Fourth Dist., Div. Two]

[right to counsel at sentencing]; see also Cal. Const., art. I, § 14 [a criminal defendant has a state constitutional right to representation by counsel at felony arraignment]; Pen. Code, § 859 [court may not accept guilty plea to noncapital felony offense in absence of defense counsel].)

Though a defendant may waive his right to counsel and represent himself at any stage of the proceedings, by doing so he "surrenders 'many of the traditional benefits associated with the right to counsel.'" (*People v. Crayton, supra*, 28 Cal.4th at p. 362, citing *Faretta v. California* (1975) 422 U.S. 806, 835.) For this reason, a defendant must knowingly and intelligently waive his right to counsel before he may be permitted to represent himself. (*People v. Burgener* (2009) 46 Cal.4th 231, 240-241.)

Here, it is clear that defendant did not waive his right to counsel when, on October 8, the court relieved Attorney Kenyon and ordered defendant to represent himself in all further proceedings in RIF129331, RIF132231, and RIM514795. Indeed, defendant categorically told the court he did not wish to represent himself; he wanted the court to appoint another attorney in place of Attorney Kenyon, which would have been defendant's seventh or eighth appointed attorney.

After defendant was ordered to represent himself, he entered into a plea agreement and pled guilty to one count of burglary in RIF129331 in exchange for a total sentence of eight years eight months in RIF129331 and RIF142638, without the assistance of counsel. On October 14, the court accepted the plea agreement, vacated defendant's original sentence in RIF142638, and resentenced defendant in RIF142638 without his

being represented by counsel. Finally, on October 29, defendant was sentenced to eight months in RIF129331, again without the assistance of counsel.

As the People concede, the order requiring defendant to represent himself deprived defendant of his right to counsel at the plea bargaining stage of RIF129331 and at the sentencing stage of RIF142638. As the People further concede, the remedy is to reverse defendant's burglary conviction in RIF129331 and remand the matter for further proceedings in that case, including trial. And because defendant was resentenced in RIF142638 without the assistance of counsel, the matter must be remanded for resentencing in RIF142638. (*In re Smiley* (1967) 66 Cal.2d 606, 625-626 [no showing of prejudice required when defendant is denied right to counsel].)

Although the court was understandably frustrated with defendant's serial *Marsden* motions, the court erred in simply relieving Attorney Kenyon and ordering defendant to represent himself. The court's options were to deny the motion if it lacked merit, or grant it if it had merit and appoint another attorney to represent defendant in place of Attorney Kenyon. (*Marsden, supra,* 2 Cal.3d at p. 123.) The court did not have the option of simply relieving Attorney Kenyon and ordering defendant to represent himself over defendant's express objection and without his knowing and intelligent waiver of his right to counsel. (*Faretta v. California, supra,* 422 U.S. at p. 835.)

C. *Defendant's Presentence Custody Credits in RIF142638 Must Be Recalculated*

Lastly, defendant claims he is entitled to one additional day of presentence custody credit in RIF142638. As defendant points out, at the time he was resentenced in

RIF142638 on October 14, he was awarded 289 days of presentence custody credit, consisting of 193 actual days plus 96 days pursuant to section 4019. He claims he should have been credited with 194 actual days, rather than 193, and his 96 days of local conduct credit would not change.

The People submit that in light of the need to resentence defendant in RIF142638, the reversal of his conviction and sentence in RIF129331, and the complicated nature of making the correct calculation, defendant's custody credits should be recalculated at the time of his resentencing in RIF142638. We agree.

Indeed, it appears defendant was in local custody on RIF142638 and RIF129331 on some of the same days, and he is not entitled to duplicative presentence custody credit. (*People v. Lathrop* (1993) 13 Cal.App.4th 1401, 1402-1405.) The issue is further complicated by the fact defendant was sentenced to 180 days time served for his section 69 misdemeanor conviction in RIF132231. The validity of defendant's conviction and sentence in RIF132231 are not before this court.

IV. DISPOSITION

The judgment in RIF142638 is modified to reflect a conviction of *attempted* grand theft in lieu of grand theft in count 2. In addition, defendant's burglary conviction and sentence in RIF129331 are reversed, and the matter is remanded for further proceedings. The matter is also remanded for resentencing in RIF142638. The court is directed to recalculate defendant's presentence custody credits in RIF142638 at the time it resentences defendant in that case. In light of the reversal of defendant's burglary

conviction in RIF129331, his out-on-bail enhancement (§ 12022.1) in RIF142638 must be stayed pending the outcome of the charges in RIF129331. (*People v. Meloney* (2003) 30 Cal.4th 1145, 1149.)

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/s/ King
J.

We concur:

/s/ Hollenhorst
Acting P.J.

/s/ Miller
J.